
No. 2783.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Louisa Pickens and Johanna Schutt,
Appellants,

vs.

J. H. Merriam, Eugene Wellke,
Alma J. Schmidt, Amanda Kat-
zung, Minnie S. Farnsworth,
Corrine Loveland and Don
Ferguson,
Appellees.

BRIEF OF APPELLEES.

Upon Appeal from the United States District Court
for the Southern District of California, Southern Di-
vision.

WM. J. HUNSAKER,
E. W. BRITT,
LEROY M. EDWARDS,
JOSEPH L. LEWINSOHN,
J. H. MERRIAM.
1132 Title Insurance Building,
Los Angeles, California,
Solicitors for Appellees.

Filed

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F. D. Monckton

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PREFATORY STATEMENT.

It will be unnecessary for us to make an extended statement of the case, but the following chronology may be of assistance to the court:

Aug. 7, 1903. Ferdinand Fensky died. [Tr. p. 5.]

Oct. 15, 1903. Jeanette Fensky was appointed administratrix of the estate of Ferdinand Fensky, deceased, by the Superior Court of Los Angeles county. [Tr. 8.]

Sept. 9, 1903. M. S. Campbell was appointed administrator of said estate in Kansas by the probate court of Shawnee county. [Tr. 10.]

Oct. 22, 1903. Campbell filed his inventory. [Tr. 10.]

July 29, 1904, and Aug. 3, 1904. Plaintiffs executed their deeds of release of all interest in said estate. [Tr. 16-17.]

Mar. 30, 1905. Jeanette Fensky filed her final account, which was received and approved by the court and she was forthwith discharged as administratrix. [Tr. 18.]

Sept. 18, 1907. Jeanette Fensky executed and delivered deeds to certain of defendants. [Tr. 21.]

July 8, 1908. Jeanette Fensky died. [Tr. 21.]

Aug. 1, 1908. Defendant J. H. Merriam appointed administrator of estate of Jeanette Fensky by the Superior Court of Los Angeles county. [Tr. 22.]

Sept. 8, 1909. Defendant Merriam filed his inventory and final account. [Tr. 22.]

July, 1912. One of daughters of complainant Louisa Pickens secured access to correspondence between Campbell and Jeanette Fensky. [Tr. 27.]

July 8, 1914. Appellants filed their bill of complaint. [Tr. 32.]

Appellants have discussed several propositions in their brief which it will not be necessary for us to notice. The appellees will address themselves exclusively to three points, any one of which is decisive of this appeal. The first point is that plaintiffs' pretended cause of action is barred by the statute of limi-

tations. The second point is that plaintiffs have been guilty of laches. The third point is that the alleged fraud complained of by appellants is intrinsic in character and not extrinsic, and, therefore, insufficient to move a court of equity to disregard the decrees in probate.

I.

Plaintiff's are Barred by the Statute of Limitations.

The gist of the matter with reference to appellees' first point is that the bill of complaint does not state a cause of action, because it fails affirmatively to disclose facts and circumstances excusing plaintiffs from commencing their suit within three years.

The statutory period within which an action may be brought for relief on the ground of fraud is three years, and "the cause of action in such case [is] not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (Code of Civil Proc., sec. 338, subd. 4.) The provision of the statute regarding discovery is derived from the principles of equity jurisdiction. The rule in equity is that knowledge of facts which would put a reasonably prudent man upon inquiry is equivalent to discovery, and our statute and similar statutes have been construed in the light of this rule. (*Rugan v. Sabin*, 53 Fed. 415, 419 [C. C. A. 8th Cir. 1892]; *Redd v. Brun*, 157 Fed. 190, 192 [C. C. A. 1907]; *Lady Washington Cons. Co. v. Wood*, 113 Cal. 482 [1896]. As was said by Sawyer, J., in *Norris v. Hag-*

gin, 28 Fed. 275 [C. C. D. Cal. 1886, affirmed in 136 U. S. 386]:

“To ascertain of what acts a discovery of the facts constituting the fraud affording the ground for relief consists, we must go to the principles established in equity law, whence the idea was derived.”

28 Fed. 280.

When the bill of complaint was filed, almost eleven years had elapsed since the commission of the initial fraud upon which the cause of action is attempted to be grounded. Almost five years had elapsed since the last decree in probate. The statutory period had run several times over. *Prima facie* plaintiffs' alleged cause of action was barred. The only ground on which plaintiffs can ask the court to investigate their claim is that they excusably failed to discover the frauds complained of within three years. Does the bill of complaint disclose such a case?

Let us inquire as to the principles governing the manner of stating a cause of action such as plaintiffs have attempted to plead.

In the leading case of *Wood v. Carpenter*, 101 U. S. 135 [1879], the principles are stated as follows:

“In this class of cases the plaintiff is held to stringent rules of pleading and evidence, ‘and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might

not have been before made.' *Stearns v. Page*, 7 How. 819, 829. * * *

"A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. *Carr v. Hilton*, 1 Curt. C. C. 220.

"The fraud intended by the section which shall arrest the running of the statute must be one that is secret and concealed, and not one that is patent or known. *Martin, Assignee, etc., v. Smith*, 1 Dill. 85, and the authorities cited.

" 'Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.' *Kennedy v. Greene*, 3 Myl. & K. 722. 'The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.' *Angell, Lim.*, sec. 187 and note.

"A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it."

101 U. S. 140-141.

In *Lady Washington Cons. Co. v. Wood*, 113 Cal. 482 [1896], it was said:

"It must appear that he did not discover the facts constituting the fraud until within three

years prior to commencing the action. This is an element of the plaintiff's right of action, and must be affirmatively pleaded by him in order to authorize the court to entertain his complaint. 'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts 'constituting the fraud,' within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. * * * He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them—as that they were done in secret or were kept concealed; and he must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged; and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts."

113 Cal. 486, 487.

In what manner have plaintiffs undertaken to discharge the obligation resting on them affirmatively to state with definiteness and particularity how and when they discovered the alleged fraud and why they did not sooner discover it? Plaintiffs' attempt to plead such matter is found in paragraph XVI of the bill of complaint. That paragraph reads:

“Complainants aver that until late in the summer of 1912 they did not, nor did either of them, have any notice, knowledge or suspicion of the truth respecting the amount, extent and value of the estate of their deceased brother, nor of the frauds and fraudulent conduct of the said M. T. Campbell, the said Jeanette Fensky, and the said J. H. Merriam, nor did either of them have any notice, knowledge or suspicion of the truth respecting the undelivered deeds made by the said Jeanette Fensky in her life time, to the defendants herein, as heretofore stated; that during the month of July, 1912, one of the daughters of the complainant Louisa Pickens, while visiting in Los Angeles, California, accidentally secured access to the correspondence between the said M. T. Campbell and the said Jeanette Fensky, which disclosed to said daughter a part of the truth relative to the estate of Ferdinand Fensky, and the dealings of the said Campbell and the said Jeanette Fensky in reference thereto; that the undelivered deeds signed by the said Jeanette Fensky were recorded a few days after her death, but were made and acknowledged several months before she died; that until in the early part of 1913, neither of the complainants had any notice or knowledge that said deeds were not delivered during the lifetime of Jeanette Fensky, although the complainants had knowledge of the contents of the inventories filed by the said Campbell, the said Jeanette Fensky and the said Merriam; that these complainants, through their children and otherwise, during the pendency of the proceedings in said probate court of Shawnee county, Kansas, and during the pendency of the proceedings in the Superior Court of

Los Angeles county, California, involving the administration of the estate of the said Ferdinand Fensky and of the said Jeanette Fensky, paid attention to said proceedings, and from time to time secured copies of papers that were filed therein; that none of said papers and none of the records disclosed the truth as your complainants now aver it to be, and their present knowledge concerning the extent and value of the estate of their deceased brother, and of the facts relating to the estate of the said Jeanette Fensky has been secured since the discovery of the correspondence between the said Campbell and the said Jeanette Fensky, which aroused the suspicion of complainants and caused them to and they have used extraordinary efforts to learn the facts. And complainants aver that they believed the statements contained in the said inventories and believed the representations made to them by the said Jeanette Fensky, and by the said Campbell and by the said Merriam; and aver that except for such representations they would not have released the estate of said Ferdinand Fensky from their just claims, but would have enforced the same." [Trans. pp. 26-28.]

The object of plaintiffs' bill is to recover "their distributive share of the estate of their deceased brother," Ferdinand Fensky (par. 3). The basis of the cause of action stated is the alleged fraud and false representations of Jeanette Fensky, his widow, in making, as administratrix of his estate, an untrue and incomplete return and inventory of his property in California, in conjunction with similar representations by one Campbell, her agent, who, as administrator in Kansas, falsely

represented to plaintiffs the nature and extent of the estate there situated. It is claimed that by reason of these false representations made directly to plaintiffs, and also in the two inventories, plaintiffs were induced to execute a deed of release of all of their interest in the estate. The other defendants are alleged to be grantees in deeds executed by Jeanette Fensky prior to her death (but not delivered until after her death), without consideration, conveying property which in fact belonged to the heirs of Ferdinand Fensky, except the defendant Merriam, who, as administrator of the estate of Jeanette Fensky, is alleged to have filed a false and incomplete inventory.

It will be observed that complaint is made of matters which transpired as long ago as 1903. It is alleged that "late in the summer of 1912" plaintiffs had no notice or suspicion of the fraud which they now claim was practiced on them. (Par. 16.) In describing how the alleged fraud came to be discovered it is said that a member of their family "accidentally secured access to the correspondence between the said M. T. Campbell and the said Jeanette Fensky," which disclosed a *part* of the true state of affairs. It is not alleged *what part of the fraud* was thus discovered nor how the other facts came to the knowledge of plaintiffs; neither does it appear that at the time of Ferdinand Fensky's death plaintiffs made any inquiry among the friends, neighbors or advisors of the deceased regarding the extent or character of his property; nor that they made investigation among the real estate men of Topeka regarding the Fensky addition.

From the allegations in the complaint, it is submitted, the court can plainly see that by the exercise of ordinary diligence all of the facts constituting the alleged fraud could have been discovered many years ago and immediately after the transaction took place. It is alleged that plaintiffs watched the court proceedings, took copies of papers and knew the contents of the inventories filed in the estate of both Ferdinand Fensky and Jeanette Fensky. It is alleged that the fraudulent deeds of Jeanette Fensky were recorded "a few days after her death." Plaintiffs have known of this, for their allegation is that they did not know until early in 1913 that these deeds *had not been delivered*. Knowing that Jeanette Fensky had no property other than that which she had acquired by descent from her husband, plaintiffs also knew in 1908 at the very latest that she was in possession of all the property which was the subject-matter of this action. Their delay at least since that time is inexcusable.

The learned trial judge reached the conclusion that the bill of complainant did not show the delay of plaintiffs was excusable. He said:

"Even in the case of the fraud charged, it is clear that many of the things alleged to have been misrepresented or concealed must have been within the knowledge of complainants. They were sisters of the intestate; they must have had information as to when he married, whether his property was obtained previous thereto, and whether or not it was separate or community property.

It is clear from allegations in the complaint

that much of the valuable property in Topeka, Kansas, was a part of an addition in that city bearing the intestate's name; one of the complainants resided in that city and it surely must be true in spite of allegations seemingly pointing to the contrary, that she knew of the fact of property being owned there by her brother, and it is fair to assume that if such property constituting such 'an addition' as is referred to had been sold as city or town lots under contract, that some or much of it had been improved by the vendees thereof, and it consequently must have come to her that such vendees or presumed occupants in possession, went into possession under some claim of title or contract of sale, and that, in *consequence*, *must* have known that the moneys derivable therefrom at the time of the death of the deceased, could not, under the Kansas law as alleged in the bill, have descended by succession to the widow. In spite of all this information which it must be presumed complainants had, there was a delay from 1903, the date of death of the intestate until July, 1914, a period of almost eleven years, before suit was brought. During that time not only had the years run as just indicated, but conditions and circumstances had changed. The estate of complainants' brother had been entirely administered. Except what came to complainants as set forth in the bill, it had passed by distribution to the wife of the intestate, she in turn had deceased, and all of her property has been either by conveyance or distribution passed to other persons who are now made defendants in this proceeding." [Trans. 50-51.]

The view taken by the learned trial judge is sustained by the authorities.

In *Wood v. Carpenter*, 101 U. S. 135, the facts are thus succinctly stated in the syllabus:

“A, who had recovered judgment in 1860 in a court of that state against B, brought suit in 1872, alleging that the latter, in 1858, in order to defraud his creditors, confessed judgments, incumbered his property, and in 1862 transferred his real and personal estate to sundry persons, who held the same in secret trust for him; that on being arrested in 1862, upon final process to compel the payment of A’s judgment, he deposed that he was not worth twenty dollars, and had in good faith assigned all his property to pay his creditors; that A, believing the statement, and relying upon the representations of B, that C, his son-in-law, would with his own means purchase the judgment for fifty cents of the principal and interest, sold it in 1864 to C; that he has since discovered that the money he received therefor belonged to B; that the latter has now an indefeasible title to the property; and that said judgment has been entered satisfied.”

101 U. S. 135.

The statute of limitations was six years with the usual further period “if any person liable to an action shall conceal the fact from the person entitled thereto.” The defendant filed an answer and the plaintiff a replication. In the replication it was averred:

“* * * that the concealment was effected by the defendant by means of fraud, perjury, and the

other wicked devices set forth and described in the plaintiff's complaint herein; and that the plaintiff had no knowledge of the facts so concealed by the defendant until the year 1872, and a few weeks only before the commencement of this suit."

101 U. S. 138.

A demurrer to the replication was sustained and defendant had judgment, which was affirmed by the Supreme Court. The court said in part:

"Upon looking carefully into the reply, we find it sets forth that the concealment touching the cause of action was effected by the defendant by means of the several frauds and falsehoods averred more at length in the complaint. The former is only a brief epitome of the latter. There is the same generality of statement and denunciation, and the same absence of specific details in both. No point in the complaint is omitted in the reply, but no new light is thrown in which tends to show the relation of cause and effect, or, in other words, that the protracted concealment which is admitted necessarily followed from the facts and circumstances which are said to have produced it.

"It will be observed also that there is no averment that during the long period over which the transactions referred to extended, the plaintiff ever made or caused to be made the slightest inquiry in relation to either of them. The judgments confessed were of record, and he knew it. It could not have been difficult to ascertain, if the facts were so, that they were shams. The conveyances to Alvin and Keller were also on record in the proper offices. If they were in trust

for the defendant, as alleged, proper diligence could not have failed to find a clew in every case that would have led to evidence not to be resisted. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort."

101 U. S. 139-140.

In *Redd v. Brun*, 157 Fed. 190 (C. C. A. 8th cir. 1907), a suit by a judgment creditor to set aside his debtor's conveyance to the latter's sister, the court said:

"This suit was instituted more than five years after the deeds assailed were spread upon the public records. The statute barred suits for relief against frauds in three years after the discovery of the facts which would awaken a person of reasonable prudence to an inquiry which would lead to their discovery. In the face of this statute, reasonable diligence required that the complainant, who suspected conveyances of real estate would be made or procured by Tillett for the purpose of concealing his property and defrauding his creditors, should examine the public records in his name, which would be likely to disclose and which did disclose such conveyances, at least once in three years. He failed to make this search, and to inquire among Tillett's neighbors and friends so as to ascertain his relationship to Mrs. Stortes, until the statutory time had passed. The burden was upon him in this suit to show some sound reason why he did not make this search and inquiry in less than four years after the means of discovering the fraud were within his reach, and why a court of equity should refuse to apply its doc-

trine of *laches* until more than two years after the statutory limitation upon a like action had expired. He did not successfully bear this burden. He failed to establish any reasonable excuse for his postponement of his inquiry and search for more than four years after these deeds had been recorded. If by a failure to make the search and inquiry after the public record disclosed the means of discovery he could toll the limitation of the statute two years beyond the statutory time, it is not perceived why by a continued failure he might not toll it indefinitely; and as no equitable reason has been shown why the doctrine of *laches* should not be applied after the expiration of the limitation, the complainant has no standing in equity. He was guilty of *laches* which bars his suit, and the decrees below must be affirmed.”

157 Fed. 194-195.

Appellants rely upon the following cases:

Lataillade v. Orena, 91 Cal. 565;

Kane v. Cook, 8 Cal. 449;

Currey v. Allen, 34 Cal. 254;

Odell v. Moss, 130 Cal. 352;

Duffitt v. Tuhan, 28 Kan. 292;

McMullin v. Loan Association, 64 Kan. 298;

Gafford v. Dickinson, 37 Kan. 287;

McAdow v. Boten, 67 Kan. 136;

Bailey v. Glover, 21 Wall. 342;

Meader v. Norton, 11 Wall. 442.

The case of Lataillade v. Orena, *supra*, is sufficiently distinguished from the case at bar by the following paragraph in the opinion:

“It must be observed that the relations of the parties were such as would naturally inspire trust and confidence on the part of the plaintiff in the defendant. The defendant was plaintiff’s step-father and guardian, and brought him up in his own family and as his own son. Plaintiff always, up to the time of the rupture in 1885, placed implicit confidence in whatever defendant told him, and never doubted its truth. He had no knowledge, and no reason to suspect, that a fraud was being practiced upon him. There was nothing, therefore, to put him upon inquiry, and under such circumstances we do not see how it can be said that he failed to use due diligence to detect the fraud, or how he can be presumed to have known anything concerning it.”

91 Cal. 578.

In *Kane v. Cook*, *supra*, and *Currey v. Allen*, *supra*, the doctrine of the court is that where relief is sought on the ground of fraud the statute of limitations does not commence to run until the discovery of the fraud. In *Odell v. Moss*, *supra*, it is held that in case of an express trust, the statute does not commence to run in favor of the trustee until a repudiation of the trust is brought home to the *cesti que* trust. The question of diligence was not involved or considered in any of these cases.

In *Duffitt v. Tuhan*, *supra*, the court applied the rule that the statute does not begin to run until fraud is discovered, adding that “for this purpose there is no constructive discovery.” (Page 299.) This case is contrary to the cases in the Federal courts and

courts of equity generally, as explained above. In *McMullin v. Loan Association*, *supra*, the statutory period was five years and the action was brought within six years. The fraud consisted of false entries and statements in written reports by a secretary. The secretary's reputation for honesty and integrity during the time he was in charge of the office was good. Plaintiffs had no knowledge of the fraud until about a month prior to the commencement of suit. It was held that the facts did not put them upon inquiry. In *Gafford v. Dickinson*, *supra*, and *McAdow v. Boten*, *supra*, no question touching the statute of limitations was involved or discussed.

In *Meader v. Norton*, *supra*, the facts were entirely dissimilar to the facts here. The only statement that has any possible relevancy is the statement at the close of the opinion:

“*Laches* and the statute of limitations are set up in argument, but such defense cannot prevail where the relief sought is grounded on a charge of secret fraud, and it appears that the suit was commenced within a reasonable time after the evidence of the fraud was discovered.”

20 Law Ed. 188.

In *Bailey v. Glover*, *supra*, which involved the question whether the two-year statute of limitations in bankruptcy commenced running against a fraudulent transfer until discovery, the court applied the rule in equity. Speaking through Mr. Justice Miller, it was said in part:

“We also think that, in suits in equity, the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.”

22 Law Ed. 638.

II.

Plaintiffs Have Been Guilty of Laches.

Practically everything that has been said above regarding the statute of limitations is equally applicable under the present heading, because, in determining whether or not a claim is stale, courts of equity follow the analogy of the statute; and if the statutory period has run, “the burden is on plaintiff to show why it should be extended. It is on the complainant to show by suitable averments in his bill that it would be inequitable to apply it to his case.”

Kelley v. Boettcher, 85 Fed. 55, 62 (C. C. A., 8th Cir., 1898).

The same strict rules of pleading discovery, stated above, obtain when the issue is *laches*.

Hardt v. Heidweyer, 152 U. S. 547, 558-559 (1893).

Appellants urge, however, that the defense of *laches* is not available unless the lapse of time has resulted

in prejudice to the defendants (their brief, pp. 36-38.) It is true that mere lapse of time, generally speaking, is not enough to show *laches*; but prejudice may be presumed from lapse of time,

Cahill v. Superior Court, 145 Cal. 42, at 48 (1904),

or from other circumstances showing that a change in position *might* have occurred.

McNeill v. McNeill, 170 Fed. 289 (C. C. A., 9th Cir., 1909).

If it appears that an important witness has died, that sufficiently shows prejudice.

Hinchman v. Kelley, 54 Fed. 63, at p. 66 (1893), (C. C. A., 9th Cir.);

Foster v. Mansfield Co., 146 U. S. 88, at p. 100 (1892);

Socrates etc. v. Realty Co., 130 Fed. 293, at p. 297 (C. C. A., 9th Cir., 1904).

A marked increase in value of the property, which will be presumed from a marked increase in population, together with lapse of time shows *laches*.

Gallihew v. Cadwell, 145 U. S. 368 (1892).

As already pointed out, about eleven years elapsed between the time of the alleged fraud and the filing of plaintiff's bill of complaint. During that time the property was the subject of conversion and reconversion. There were three decrees in probate and Jeanette Fensky, who is charged to have been the prime mover in the alleged fraud, died. A large part of the estate consisted of real property situated in Los Angeles and

San Pedro, which having greatly increased in population. These facts show a change in position.

A reference to the cases will show not only that the circumstances disclosed by the bill of complaint do not negative *laches* with the definiteness required by law, but that they affirmatively convict plaintiffs of *laches*.

The case of Phelps v. Grady, 168 Cal. 73 (1914), is strikingly similar to the case at bar on its facts. In that case it appeared that plaintiff had purchased the interest of certain interveners in an estate. The interveners alleged that they had been prevailed upon to sell their interest by false representations of the plaintiff as to the nature and extent of the property belonging to the estate. Eight years having elapsed since the frauds and five years since a decree in probate, it was held the interveners were guilty of *laches* in not sooner pressing their claims because they had knowledge of sufficient facts to put them upon inquiry.

The controlling facts are thus stated in the opinion:

“* * * they allege that in January, 1904, Josephine A. Phelps, plaintiff herein, opened negotiations with them by correspondence for the purchase of their interest in her husband's estate. She represented to them that the value of the estate was about ninety thousand dollars, and that the value of the entire portion of the estate devised and bequeathed to Phoebe W. Daughaday was only about \$3333.33. They aver that these representations were false and untrue and were known to Mrs. Phelps to be false and untrue, and were made by her for the purpose of deceiving them. Certain other false representations are de-

clared. It is said that Mrs. Phelps represented that on account of the condition of the estate distribution could not be had for many years; and that the family allowance of four hundred dollars a month decreed by the court would, during the progress of the administration, consume a large portion of the estate. The interveners further allege that Mrs. Phelps was the widow of their mother's brother and that because of this relationship they believed that she would deal with them in all respects fairly and justly, and that so believing they relied upon these representations and parted with their interest to her * * * But in this case the conveyance was executed in 1904. The decree of final distribution in the estate of Timothy Guy Phelps was given in 1907. This action was commenced in 1912, and here for the first time interveners are found asserting the right to avoid their conveyance because of its fraudulent procurement."

168 Cal. 77.

The allegations of the complaint touching discovery are thus stated in the opinion:

"That interveners herein did not discover that the representations made to them by said Josephine A. Phelps, as alleged in paragraphs VII and VIII of this complaint in intervention were untrue nor did they nor any of them have any truthful information concerning the matters and subjects covered by said representations until about the month of October, 1911. That on or about the 1st day of October, 1911, said interveners were informed for the first time that some time in the year 1907 said Josephine A. Phelps had entered

into a contract to sell a certain portion of the real estate to Timothy Guy Phelps, and a part of the real property described in the complaint herein at a price which seemed to indicate that the value of the entire estate of Timothy Guy Phelps, deceased, was in and during the year 1904 very much greater than had been represented to interveners as above related by said Josephine A. Phelps. That thereupon said interveners made inquiry and investigation and were informed that in and during the year 1904 the estate of Timothy Guy Phelps, deceased, was of a value many times greater than \$90,000.00.' ”

168 Cal. 78-79.

The court made the following observations upon these averments:

“Frauds are infinite in their variety, and while the rules of equity apply equally to all, when the doctrine of *laches* or stale demand is invoked, and the question involved is why was not the discovery earlier made, each case must be interpreted and construed under its own facts. * * * The false representation it is asserted was as to the value of the lands of the estate, which lands were situated in a populous county adjacent to the city and county of San Francisco. The fact that the estate owned these lands is not only not questioned but is declared. While it is conceivable that a person under such circumstances might misrepresent to another at a distance the value of those lands, it is impossible that that person could have concealed from the grantors knowledge of the true value had the slightest inquiry been made. It cannot be said, therefore, and of course it is not

alleged, that Mrs. Phelps ever did or attempted to do anything to conceal from these interveners knowledge of the true value of the land. If, under such circumstances, with every means of information open and patent before them, they may refuse to make inquiries for seven years, they may do so for seventy. There is an absolute failure to show not only due diligence but any diligence in seeking to discover during all this intervening time whether or not they had parted with their property at a fair valuation. The fact that they lived at a distance is of course no excuse. They were under no other disability.”

168 Cal. 79-80.

In *Hardt v. Heidweyer*, 152 U. S. 547 (1893), an action was brought in 1889 by creditors for relief against a fraudulent conveyance alleged to have been made in 1884; and executions levied at the same time upon fraudulent judgment notes.

An amendment to the complaint “intended to cover the objection of *laches*” (p. 551) alleged that at the time of the frauds and at all times since complainants were residents of the city of New York while defendants were residents of the city of Chicago; that immediately after the entry of the judgments complainants caused an investigation to be made and were lulled into inaction by false statements of defendants. It was further alleged:

“‘A long time afterwards and within, to-wit, less than one month from the time of bringing this suit, your orators for the first time learned not only that said judgments covered and took all

the tangible property of said Heidweyer & Stieglitz, but that the entry thereof was procured by them for the express purpose of preferring said judgment creditors, and that at the same time they transferred all their remaining property to a trustee for the benefit of creditors, as heretofore in this bill alleged, thereby creating an assignment, as herein alleged.' ”

152 U. S. 552.

After quoting from several cases, the court quoted the following from *Wood v. Carpenter*, 101 U. S. 135, 140:

“ ‘A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner.’ ”

152 U. S. 559-560.

The court continued:

“Tested by this rule, it is apparent that this bill must be held deficient in not showing how knowledge of the wrongs complained of was obtained by the plaintiffs. It is alleged that they were ignorant, and now have knowledge; and that they acquired such knowledge within a month prior to bringing the suit; but how they acquired it, and why they did not have the same means of ascertaining the facts before, is not disclosed.”

152 U. S. 560.

After disposing of certain of the allegations, the court proceeded:

“There remains, therefore, as the concealed wrongs, only these matters: First, that the judgment notes were in excess of the real demands; second, that Heidweyer & Stieglitz transferred their bills and accounts receivable in trust to Florsheim, and that that trust included an individual debt of one of the partners. That the plaintiffs knew of the existence of these bills and accounts is shown, and their alleged ignorance is only of the fact of their transfer in trust.

“Now, it is a matter of common experience that when there is so pronounced a failure on the part of a firm carrying such a large stock, there is made by the creditors a thorough examination of the situation. That such an examination, if made, would disclose any substantial difference between the true indebtedness to these preferred creditors and the amount of the notes given to them seems reasonably certain, and if no such examination was made, it indicated indifference on the part of the other creditors. If the plaintiffs relied on the mere statements of these defendants, why did they cease to rely upon such statements, and how did they become advised of their untruth? So, with reference to the bills and accounts receivable; knowing what they were, they could easily have ascertained whether they were collected, and if so, by whom. If collected by other than their debtors, that fact certainly should have provoked inquiry. If collected by the debtors, why were the moneys received not appropriated in payment of other than the preferred claims?

“These are matters in respect to which the bill fails to enlighten us. Indeed, so far as disclosed, it would seem that when the debtors failing, and failing for so large a sum, appropriated all their

tangible property to the payment of a few of their creditors, the others, including these plaintiffs, accepted the situation, and made no inquiry or challenge of the integrity of the transaction for nearly five years. Such indifference and inattention must be adjudged *laches*.”

152 U. S. 560-561.

In *Foster v. Mansfield etc. R. R. Co.*, 146 U. S. 88 (1892), the court said:

“The foreclosure of this road could not have taken place without actual as well as legal knowledge of the fact by its stockholders, and if they believed they had any valuable interest to protect, it was their duty to have informed themselves by an inspection of the records of the court in which the foreclosure was carried on, of what was being done, and to have taken steps to protect themselves, if they had reason to believe their rights were being sacrificed by the directors.”

146 U. S. 99.

In *Bower v. Stein*, 177 Fed. 673 (C. C. A., 9th Cir., 1910), the complainant filed a bill in the circuit court of the United States for the district of Oregon to invalidate a judicial decree rendered in the state court “and to go behind that decree to the extent of obtaining leave to redeem the property which was sold thereunder” (p. 676). The defendant demurred. From a decree dismissing the bill, complainant appealed. The decree was affirmed. The court said in part:

“The suit to foreclose the mortgage was begun on April 30, 1898. The decree was rendered on September 9, 1898, and the sale was made on the

18th day of the following October. The present suit was begun on June 6, 1907. The bill alleges that the appellant had no knowledge of the foreclosure suit 'until after said decree was rendered,' and that she had no 'actual' notice of the sale of said property on foreclosure until 'subsequent to June, 1902.' Construing these allegations as they must be construed, most strongly against the pleader, we have to infer that the appellant knew of the foreclosure suit immediately after October, 1898, and that on July 1, 1902, she had actual notice of the sale. The date when such actual notice was received is not important, for knowledge of the foreclosure suit imparted notice to her that a sale would follow in due course. It is a well-established principle of equity practice that diligence must be exercised in asserting the right to set aside a decree in cases of this nature. Unnecessary delay is deemed a waiver of the right. It is no excuse for such delay that the plaintiff is without means or resides in a distant state.

* * * * *

"The appellant herein had notice of the foreclosure suit as early as October,, 1898. The records were public, and at all times accessible to her. Everything which she now complains of was discoverable upon examination thereof. She could then have ascertained all of the facts in regard to the sale in ample time to have redeemed therefrom. The possession of the means of knowledge was equivalent to knowledge itself. Having had the opportunity of knowing, she cannot now avail herself of her failure to acquire actual knowledge of the facts."

Before passing to the next point, it remains briefly to distinguish the cases cited by appellants under their caption "Complainants not guilty of *laches*."

The first case cited is the case of *Pickens et al. v. Campbell et al.*, 159 Pac. 21 (1916); a decision of the Supreme Court of Kansas on litigation growing out of the subject-matter upon which this suit is grounded. The Kansas court held that in the case before it the plaintiffs' complaint stated a cause of action. Reference is made to the memorandum opinion of the lower court in the case at bar, and it is expressly conceded that a different rule of pleading with reference to discovery prevails in the Kansas than in the Federal courts. (159 Pac. at 23, 24.)

In *O'Brien v. Wheelock*, 184 U. S. 450 (1902), the bill was dismissed because of *laches*. The suit was to charge land owners with liability for the amount of levee assessments under an unconstitutional statute. A decree in a former suit permitted the owner of certain bonds by supplemental or original bill to bring in the land owners. He took no steps to do so during his lifetime, which continued for about six years after the decree, and the bill was brought by his executors about nine years after such decree, during which time the owners of the property assessed were constantly changing, and they had spent large sums for repair of the levee and had also been liable for very large assessments under a new statute.

Galliher v. Cadwell, 145 U. S. 368 (1892), is one of a line of Federal cases holding that when property

has increased in value during the interval of time which has elapsed, the plaintiff's action is barred. In that case Tacoma had increased in population from 1098 to 36,006 in ten years. The court said:

“Of course such a rapid increase during this decade implies an equally rapid and enormous increase in the value of property so situated as to be an addition to the city.” (P. 371.)

Other cases holding this doctrine will be found collected in Pom. Eq. Remedies, vol. 1, sec. 23, note 67.

In Bacon v. Bacon, 150 Cal. 477 (1907), a period of only three years elapsed between the decree in probate and the suit to set it aside. The bill was predicated on mistake consisting of the reading of a legacy as \$2,000.00 instead of \$10,000.00. The court said:

“We do not find anything in the evidence which would necessarily put her [the plaintiff] on inquiry as to the amount of the legacy, or cause her to suspect that there had been a mistake concerning it.” (P. 493.)

Soule v. Bacon, 150 Cal. 495, arose on substantially the same facts as Bacon v. Bacon, *supra*.

In Cahill v. Superior Court, 145 Cal. 42 (1904), the proceeding was in mandamus to compel the superior court to hear and consider a motion to modify and in part vacate a previous order of the court setting apart a homestead. The order of the superior court refusing to consider the motion was made on April 10, 1903, but was not entered until after May 6, 1903; within sixty days from the entry petitioners attempted

to appeal therefrom to the supreme court. On December 7, 1903, the widow moved to dismiss the appeal on the ground that the order was not appealable. On March 28, 1904, the appeal was dismissed; and application for rehearing was made and denied, and on April 28, 1904, the remittitur was issued; the present application for a writ of mandate was filed five days thereafter. The court held that prejudice could not be presumed from the lapse of time. (See p. 48.)

Appellants argue that at the time of the alleged frauds there was a fiduciary relation existing between themselves and Jeanette Fensky and Campbell. Bacon v. Bacon, *supra*, and Robins v. Hope, 57 Cal. 497 (1881), are cited. Bacon v. Bacon has to do with husband and wife, and in Robins v. Hope it was held that the parties were dealing at arm's length. It must be quite obvious that when appellants negotiated with Mrs. Fensky and Campbell for the sale of the former's interest in the estate of Ferdinand Fensky, the parties stood at arm's length.

Appellants also cite Prevost v. Gratz, 6 Wheaton 481 (1821); McIntire v. Pryor, 173 U. S. 38 (1899); and Meader v. Norton, 11 Wallace 442. The last case cited seems entirely beside the point.

In Prevost v. Gratz, *supra*, the bill was dismissed because of *laches*. Mr. Justice Story, who delivered the opinion, said that concealment of fraud was an aggravation of the offense; he added, however,

“That length of time necessarily obscures all human evidence; and as it thus removes from the

parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption in favor of innocence, and against imputation of fraud.” (P. 498.)

In *McIntire v. Pryor*, *supra*, it was held that under the circumstances of that case the lapse of nine years did not constitute *laches*. The court pointed out:

“That the plaintiff is an ignorant colored woman; that she has been wheedled out of her property by an audacious fraud committed by one in whom she placed entire confidence, and who assumed to act as her agent; that this agent procured the title to the property to be taken in his own interest, for little more than a nominal sum, by the false personation of Emma Taylor; that the property is still controlled and probably owned by himself; that the position of the property and of the parties to the suit has not materially changed during the time the plaintiff has been in default, nor the property shown to have rapidly risen in value, and that the rights of no *bona fide* purchaser have intervened.”

173 U. S. 53-54.

III.

The Alleged Fraud was Intrinsic.

The question involved in appellees' third point is whether the acts of fraud alleged in the bill of complaint are intrinsic or extrinsic to the various orders and decrees of the probate courts upon which attack is made by the complaint. If they constitute extrinsic fraud the plaintiffs have the right, so far as this par-

ticular point is concerned, to have their allegations investigated; on the other hand, if they constitute intrinsic fraud, no such right exists and the motion to dismiss was properly granted. It may be postulated that, a proceeding in probate being *in rem*, the final decrees in the three probate proceedings referred to were binding upon the whole world (unless impeachable for extrinsic fraud).

Case of Broderick's Will, 21 Wall. 503 (1874);
State v. McGlynn, 20 Cal. 233 (1862).

Let us inquire as to the distinction between extrinsic and intrinsic fraud.

In the leading case of United States v. Throckmorton, 98 U. S. 61, 65 (1878), Mr. Justice Miller said:

"There are no maxims of the law more firmly established or of more value in the administration of justice than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely: *Interest reipublicae, ut sin finis litium*, and *Nemo debet bis vexari pro una et eadem causa*. * * *

"But there is an admitted exception to this general rule, in cases where, by reason of some thing done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in

ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. * * *

“On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed.”

98 U. S. 65-66.

The learned judge referred to the case of *Green v. Green*, 2 Gray. 361 (1854), as containing “perhaps the best discussion on the whole subject,” and quoted the following from the opinion of Shaw, C. J.:

“The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been either actually tried, or *so in issue that it might have been tried*, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be controverted.” (Italics are ours.)

In the case of *Pico v. Cohn*, 91 Cal. 129 (1891), a leading case not only in California, but generally, it was said by Beatty, C. J.:

“That a former judgment or decree may be set aside, and annulled for some frauds there can be no question; but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy, that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is, that there must be an end of litigation; and when parties have once submitted a matter, *or have had the opportunity of submitting it*, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client’s interest. (*United States v. Throckmorton*, 98 U. S. 65, 66, and authorities cited.)

“In all such instances, the unsuccessful party is really prevented, by the fraudulent contrivance of

his adversary, from having a trial; but when he has a trial, he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that, necessarily, the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear."

91 Cal. 134.

An analysis of the allegations of the complaint in the case at bar will show that plaintiffs are in fact relying upon a claim that the orders of the probate courts were made as a result of false and perjured testimony. While it was claimed that there was actual and wilful concealment of material facts from the plaintiffs themselves, it appears that the alleged fraud upon which the probate court is said to have acted consisted of false returns made to that court in the course of the probate proceedings, and in perjured testimony given in support thereof, and not fraud in preventing appellants from presenting their case. In returning her inventory in the probate of her husband's estate in California, Jeanette Fensky necessarily swore that she had returned *all* of the property of the estate of which she had knowledge; and the court necessarily so determined. Plaintiffs now complain that this is not the fact, but the truth is that she concealed from them and from the court the existence of certain property which in fact belonged

to the estate, and her accounts and inventory were fraudulent and inaccurate. These accounts were all matters of record in the probate proceedings necessarily proved by her testimony, and were settled and allowed upon the strength of that testimony. Similar observation might be made regarding the other probate proceedings.

It was alleged that Jeanette Fensky failed to inventory and return to the court, as assets of the estate of Ferdinand Fensky, a large amount of property which in fact belonged to that estate. The question then is, did the appellants have an opportunity to expose the frauds complained of in the various probate proceedings? Appellants were parties to those proceedings actually or constructively; and they had actual knowledge of their pendency and progress. [Tr. 27.] Can it seriously be urged that appellants did not have a right to present to the courts of probate as a material part of the pending proceedings the facts now presented to this court? Can it be questioned that if such matters had been presented by appellants, and found favorably to them, the decrees in probate would have been different? Does not the answer to these questions necessarily involve the further answer that the frauds complained of were intrinsic and not extrinsic?

On this branch of the case, the learned trial judge said in part:

“Nothing is herein set forth which shows that the complainants were in any wise prevented from appearing in court and protecting their rights, or

from making any investigation as to the true condition of affairs. * * *

“Assuming that the unverified bill states the exact facts of the case, nevertheless there is nothing therein from which it can be even inferred that complainants were at all prevented from making the investigations which would have resulted in a disclosure of all of their rights. * * *

“The amount, character and value of the estate belonging to the intestate, however, were determined by the court, and were by it solemnly distributed, as according to the law, to defendant’s predecessor in interest.” [Trans. 52-53.]

There are a number of well considered cases in California in which the court was called to pass upon situations not dissimilar to that presented by the bill of complaint.

In *Pico v. Cohn*, 91 Cal. 129 (1891), the action was to set aside a judgment secured by reason of the perjured testimony of a witness who had been suborned by defendant’s intestate. The action was to have a deed absolute on its face declared a mortgage. The case on its facts was a hard one. The court said:

“It is averred, and we think sufficiently shown, that upon proof of these facts there is a reasonable certainty that plaintiff would, upon another trial, gain his cause. Such being the case, is plaintiff entitled to a decree vacating and annulling the former decree on the ground that it was procured by fraud?”

91 Cal. 133.

After expounding the law in the language quoted in an earlier portion of this brief, the court proceeded:

“But counsel for appellant seek to distinguish this case from those in which it has been held that a judgment will not be set aside by reason of its being based upon forged documents or perjured testimony. They say that the fraud committed by Cohn was the bribing of Johnson; that this was collateral and extrinsic; that it was not and could not have been the subject of investigation at the trial of the original action. We do not think that this distinction can be maintained. The fraud which Cohn committed was the production of perjured evidence in support of his defense. The means by which he induced the witness to swear falsely was but an incident. * * *

“It is a matter of indifference what particular form such corrupt practice takes. The evil and the wrong is in the perjury which follows. In this case the truth of Johnson’s evidence was necessarily drawn in question at the trial, and determined by the decision of the court; and all that has since been discovered is another item of testimony bearing on that point.”

91 Cal. 134-135.

In *Langdon v. Blackburn*, 109 Cal. 19 (1895) (cited with approval in *Stead v. Curtis*, 191 Fed. 529, 534 (C. C. A., 9th Cir., 1911)) it was urged that certain property in the hands of the defendant, a brother of the decedent, and his wife, was held by them in trust for plaintiff’s intestate, who was a sister of the decedent. It was alleged that the will of the decedent, under which defendants claimed, was a forgery, and

that as the result of a conspiracy plaintiff's intestate had been informed by her son, who was a party to the conspiracy with the defendant, that her entire interest in the estate of her deceased brother amounted to \$3,000.00 only; that she had accepted this amount without further questioning, and that

“ ‘But for said false statement, her reliance thereon, and the payment of said money to her, she, the said Maria Kirshner, would have had her suspicions aroused; would have made inquiries in the premises; have discovered that said purported will was a forgery, and would have opposed the probate thereof.’ ”

109 Cal. 23.

The court held that these facts did not constitute extrinsic fraud. After reviewing certain of the authorities, the court said:

“ ‘Mrs. Kirshner must have known of the death of her brother and that she was one of his heirs, and presumably must have known that he left a large estate.

“The law required that when a petition for the probate of a will is filed, and the will produced, the time for the hearing must be fixed, and the notice of the hearing published in a newspaper for a certain length of time (Code Civ. Proc., sec. 1303), and that copies of the notice of the time appointed for the probate of the will must be sent by mail to the heirs of the testator residing in this state. (Code Civ. Proc., sec. 1304.)

“It must be presumed, therefore, there being no allegation to the contrary, that a proper notice of the application to probate the will in controversy

was published and sent out as required by law, and that Mrs. Kirshner received the notice sent to her. And being thus notified it became her duty, within a year at least after its probate, to make inquiry as to the validity and contents of the will.

* * *

“It will be observed that it is not alleged in the complaint that young Findley said anything to his mother about the will or its terms, or the probate thereof, or that he advised or even suggested that it was unnecessary for her to be present at the hearing, or to employ counsel to represent her thereat, or to make any inquiries about the will or the estate. He simply told her that her interest in the estate was only three thousand dollars, and, the money being afterward paid, she quietly rested on that assurance until after the time to institute a contest had elapsed. (Code Civ. Proc., sec. 1327.)

“This did not, in our opinion, constitute such an extrinsic or collateral fraud as will enable the representative of her estate to now claim the relief asked for.”

109 Cal. 27-28.

In *Del Campo v. Camarillo*, 154 Cal. 647, 662, it was held that fraudulent concealment, at time of presenting a will for probate, of an attempted revocation of the will, and a fraudulent preservation of the document, constituted intrinsic and not extrinsic fraud, the court saying:

“It is the established law of this state, as well as of many other jurisdictions, that an order admitting a will to probate, duly made by the court

of probate jurisdiction, in a proceeding for that purpose, cannot be vacated by a court of equity for direct fraud in establishing it, consisting either of perjured testimony or a false will, produced before the court at the time of the hearing, and further, that a devisee therein cannot be declared a trustee in favor of the heir in a suit in equity by the heir based on such fraud. The fraud here complained of consisted of producing this will to the court, introducing evidence establishing its due execution, and in avoiding a disclosure of the alleged attempted revocation and fraudulent preservation thereof. All these were facts relating to the validity of the will, which was the very fact to be then determined by the court. This character of fraud comes within the same class as perjured testimony or the fraudulent production and proof of a false will previously forged.”

154 Cal. 662.

In addition to the cases reviewed above see:

U. S. v. Throckmorton, 98 U. S. 61, 65, 67 (1878);

Stead v. Curtis, 205 Fed. 439, 442 (1913);

Stead v. Curtis, 191 Fed. 529, 533-536 (1911);

Fealey v. Fealey, 104 Cal. 354 (1894).

Appellants suggest that Langdon v. Blackburn, *supra*, is distinguishable because “to grant the relief prayed for it would be necessary for the court of equity to review the action of the probate court and set aside its decree admitting the will to probate.” (Their brief,

p. 47.) In the case referred to the prayer was "that defendants be adjudged to hold one-fourth part of the property of the estate so received by them in trust for the estate of Maria Kirshner for an accounting." (109 Cal., at page 24.) It is submitted that the suggested distinction is unfounded in fact. It is moreover without merit, because the rule regarding extrinsic fraud is equally applicable when a court of equity is asked to declare defendants trustees of plaintiff.

Craigie v. Roberts, 6 Cal. App. 309 (1907);

Del Campo v. Camarillo, 154 Cal. 647 (1908).

Appellants cite in support of their contention that the alleged fraud is extrinsic the following cases:

Lataillade v. Orena, 91 Cal. 565 (1891);

Wingerter v. Wingerter, 71 Cal. 105 (1886);

Carter v. Shell, 129 Cal. 208 (1900);

Wickersham v. Comerford, 96 Cal. 433 (1892);

Marshall v. Holmes, 141 U. S. 589 (1891).

In most of the above cases the distinction between extrinsic and intrinsic fraud was neither noticed nor discussed. That is true in the following, viz.:

Wingerter v. Wingerter, *supra*;

Lataillade v. Orena, *supra*;

Wickersham v. Comerford, *supra*;

Griffith v. Gody, *supra*;

Marshall v. Holmes, *supra*.

In Curtis v. Shell, *supra*, which was a bill in equity to set aside an order granting a family allowance on the suit of a creditor, it was said:

“In this case the respondent was entirely helpless as against the proceedings in the probate court initiated and carried on by the appellant. The proceeding to set aside family allowance is *ex parte*. In fact, an order for such purpose can be entered by the court of its own motion. The complaint charges and the court finds the suppression of a material fact, which matter thus suppressed and withheld was a fraud, not only against the respondent, but also a fraud committed upon the court. The fraud, however, was extrinsic and collateral to the question examined on the application for the family allowance.”

129 Cal. 215-216.

In distinguishing *Wickersham v. Comerford*, *supra*, it was said in *Fealey v. Fealey*, 104 Cal. 354 (1894), at page 361:

“In the original proceeding for a homestead under review in that case the court did not even *indirectly* pass upon the question of the existence or nonexistence of the agreement for separation, and that matter not being before the court, was not concluded by the judgment or order in that proceeding; but, as we have seen, the direct question sought to be litigated here, viz., whether the land set apart to defendant as a homestead was or was not community property, was put in issue in the homestead proceeding, resulting in the order here assailed; and the court, upon the evidence submitted to it at the time of making that order, found the fact adversely to the plaintiff's present contention, and this marks the important distinc-

tion between the present and the case of Wicker-sham v. Comerford, 96 Cal. 433.”

104 Cal. 361.

It has not escaped judicial animadversion that general charges of fraud are easily made; and such charges are treated as declamation rather than as allegations of fact. Especially is this true after death has called some of the material witnesses and lapse of time has dimmed the memory of others. One charging fraud is, therefore, required affirmatively to show diligence before he can move the chancellor, and if there has been failure to discover the fraud alleged for a long time, the failure must be accounted for and the manner of discovery disclosed. The present complaint is conspicuously wanting in these regards. In 1903 the plaintiffs sold their interest in the estate of their brother to his widow. Almost eleven years afterwards they brought this action to set aside the transaction on the ground that an inadequate consideration was accepted because of the fraudulent misrepresentations of the widow. Meanwhile, the widow had died and three probate proceedings had gone to final judgment. What explanation do the plaintiffs seek to give for their long delay? Only their bare assertion that they were in ignorance of the frauds until accidentally discovered in 1912. But, the complaint is entirely wanting in averment that plaintiffs made any inquiry or investigation during the long lapse of time. It does not appear but that the most cursory examination

would have disclosed the real situation. Moreover, plaintiffs disclose only the manner in which they made partial discovery, and are silent as to the rest; and they charge only such fraud as they had ample opportunity to expose to the courts of probate.

It is respectfully submitted that the judgment of the court below is correct and should be affirmed with costs to appellees.

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